IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.135/2007.

MRS. SONIA ZUZARTE ALMEIDA,
Through Attorney
Mrs. Justina Almeida,
wife of Mr. Claudio M. Almeida,
Major, married, housewife,
India National, resident of
House No.216, Zuzarte Vaddo,
Verla, Parra, Bardez – Goa. .. PETITIONER.

Versus.

1. MR. ABAJI R. VANZARI,
Son of R. Vanzari,
Major, married.

2. MRS. KUNDA ABAJI VANZARI,
wife of Abaji Vanzari,
major, married,
both residents of C/o. H. No.333,
Zuzarth Vaddo, Verla,
Parra,Bardez- Goa. .. RESPONDENTS

Mr.Nigel Da Costa Frias, Advocate for the petitioner.

Mr. Jagannath Mulgaonkar, Advocate for the respondents

Coram :- **F. I. REBELLO.**

Date : - 23rd November, 2007.

ORAL JUDGMENT :

Rule. Heard forthwith. The petitioner has applied for striking out the issue which had been framed as under :

" Whether the defendants prove that the defendant No.1 was allowed to

reside in suit room as mundkar in the year 1972 by Mr. Arthur Zuzarth and he is residing in fixed habitation?"

2. The case of the plaintiffs is that defendant No.2 was engaged as maid servant of the plaintiff's late mother to do her daily work in October 2000 and was allowed to reside in suit room. The mother of the plaintiff expired on 6.8.2001. Earlier she used to serve her mother also as a maid servant but used to return to her house. On the request of Defendant No.2, Defendant No.1 was also allowed to reside in the premises. On the expiry of his mother, the plaintiffs had requested the defendants to vacate the premises which they had orally agreed. Plaintiffs are serving abroad. As in spite of request defendants did not vacate the premises, the suit was filed by the plaintiffs for eviction of the defendants.

The defendants have denied that the properties have been bequeathed to the plaintiff. It is even denied that Arthur Zuzarth is the father of the plaintiffs. It is their contention that the late Arthur Zuzarth had allowed the defendant No.1 to reside in the said suit room as mundkar and since then, he is residing there with Defendant No.2 and their two sons. The defendants have also relied on documents, all these documents are of the year 2003.

3. Issues arise from the pleading considering the controversy to be decided. Based on the pleadings the Court has to frame relevant issues. In this case, the defendant is claiming as a mundkar. Apart from a bald assertion there are no other material particulars. The only averment is that they were residing since 1972. The document produced in support are of the year 2003 onwards. In so far as the Mundkar Act is concerned, prima facie, the person to claim mundkarship has to be in

possession and in occupation before the appointed day i.e. 12.3.1976. The plea by way of defence ought not to be frivolous or vexatious, see, Anandrao Bandu Jadhav and another, Versus Bibijan,AIR 1983, Bombay 32. In that case this Court considering framing of an issue in the context of a claim of the tenancy, held that it is based on vague plea and as such it is not possible to frame issue.

4. On behalf of respondent learned Counsel contended that they have made the necessary averments in the plaint and merely because documents are not available cannot result in non-framing of issue. He has also relied upon the judgment of Gujarat High Court in the case of Bhil Seva Mandal, Dahod and others, Versus Naik Shana Daboda and others, AIR 1980 Gujrat, 163. Considering the judgment of this Court in Anandrao Bandu Jadhav (supra) which I am in agreement with, it is not necessary to go into the judgment in Bhil Seva Mandal, Dahod and others, (supra).

5. In the instant case, the only pleading is that the Defendant No.1 was allowed to reside as Mundkar since 1972. There are no other material particulars. In other words it is a vague plea in the absence of any material particulars. The contention therefore as raised on behalf of plaintiff that issue would not arise, has to be accepted. Accordingly, issue No.5 is struck off.

It is however, made clear that though the issue has been struck off that would not mean that the respondents otherwise cannot apply before the Mamlatdar for declaration of their mundkarship if they are so entitled.

In the light of above, rule is made absolute accordingly. No order

as to costs.

F. I. REBELLO.

SMA